TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966 7

No. ~~1102~~ 74

JOHN FRANCIS PETERS, APPELLANT

vs.

NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

FILED OCTOBER 10, 1966
PROBABLE JURISDICTION NOTED MARCH 27, 1967

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1192

JOHN FRANCIS PETERS, APPELLANT

vs.

NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

INDEX

[fol. 1]

IN THE COUNTY COURT, WESTCHESTER COUNTY

PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

INDICTMENT—Filed August 25, 1964

THE GRAND JURY OF THE COUNTY OF WESTCHESTER, by this indictment, accuse the defendant of the crime of FELONIOUS POSSESSION OF BURGLAR'S INSTRUMENTS, committed as follows:

The said defendant, in the City of Mount Vernon, County of Westchester and State of New York, on or about the 10th day of July, 1964, had in his possession picks, wrenches, and other tools, the same being adapted, designed and commonly used for the commission of the crimes of burglary and larceny, under circumstances evincing an intent to use and employ the same in the commission of a crime, and knowing that the same were intended to be so used.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of New York.

/s/ Leonard Rubenfeld
District Attorney of Westchester County

[fol. 2]

568-64
28-688

WESTCHESTER COUNTY
COUNTY COURT

[File Endorsement Omitted]

PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

FELONIOUS POSSESSION OF BURGLAR'S INSTRUMENTS

/s/ Leonard Rubenfeld
District Attorney

A TRUE BILL

Received Aug. 26, 1964, Edward L. Warren,
County Clerk

/s/ A. Raymond Miller
Foreman of Grand Jury.

[fol. 3] IN THE COUNTY COURT,
WESTCHESTER COUNTY

[Title Omitted]

7909/64
71/26

NOTICE OF MOTION TO SUPPRESS, ETC.—
September 15, 1964

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavits of ROBERT S. FRIEDMAN, Esq., and JOHN FRANCIS PETERS, both sworn to the 11th day of September, 1964, and upon the transcript of the preliminary hearing had before the HON. HARRY ZIMMERMAN, Acting City Judge, Court of Special Sessions, City of Mount Vernon, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Westchester, at the Courthouse thereof, Main Street, City of White Plains, County of Westchester, State of New York, on the 29th day of September, 1964, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for

(1) an Order directing the suppression of certain evidence seized from the defendant's person,

(2) for an Order permitting the defendant to inspect the Grand Jury minutes herein, or in the alternative, if the Court should read said minutes, for an order directing the dismissal of the within indictment upon the grounds that the within indictment is not founded upon sufficient legal evidence,

[fol. 4] together with such other, further, and different relief as to this Court may seem just and proper in the premises.

Answering affidavits must be served five (5) days before the return date.

DATED: White Plains, New York
September 15, 1964

Yours, etc.,

FRIEDMAN, FRIEDMAN AND FRIEDMAN
Attorneys for Defendant
Office and Post Office Address
172 South Broadway, suite 209
White Plains, New York
Phone: WHite Plains 9-4114

TO: HON. LEONARD RUBENFELD,
District Attorney, Westchester County
Office and Post Office Address
Westchester County Courthouse
166 Main Street
White Plains, New York

[fol. 5]

* * * *

AFFIDAVIT OF JOHN FRANCIS PETERS IN SUPPORT OF MOTION TO SUPPRESS

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

JOHN FRANCIS PETERS, being duly sworn, deposes and says:

FIRST: That at all times hereinafter mentioned your deponent resided at # 30-46 23rd Street, Astoria, County of Queens, State of New York.

SECOND: That heretofore and on or about the 10th day of July, 1964, at or about 1:00 p.m. on that day, your

deponent was visiting the premises known and designated as # 465 East Lincoln Avenue in the City of Mount Vernon, County of Westchester, State of New York. That at that time and place your deponent had gone to the aforementioned premises to visit a friend.

At that time and place your deponent was descending the stairway which connects the fourth (4th) and fifth (5th) floors of said premises when he was accosted by a man who your deponent later learned to be one SAMUEL LASKY, a police officer attached to the Police Department of the City of New York. OFFICER LASKY approached your deponent while pointing a revolver in your deponent's direction. OFFICER LASKY then grabbed your deponent by the shirt collar and, while pointing his [fol. 6] revolver directly at your deponent, he asked your deponent, "What are you doing here?".

Your deponent informed the police officer that he was in said premises for the purpose of visiting his girl friend. OFFICER LASKY then asked your deponent for the name of your deponent's girl friend. Your deponent told OFFICER LASKY, in substance, that your deponent's girl friend was a married woman and, therefore, your deponent could not divulge her name. Whereupon, OFFICER LASKY started to search your deponent. The police officer removed various items of personalty from your deponent's possession.

At no time during these events did OFFICER LASKY identify himself as a police officer. OFFICER LASKY never exhibited a police badge or any other indicia of lawful authority, nor did he ever place your deponent under arrest, or exhibit to your deponent a search warrant authorizing the search of your deponent's person.

Shortly after OFFICER LASKY searched your deponent, police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York, arrived upon the scene and arrested your deponent for allegedly having violated Section 408 of the Penal Law of the State of New York, to wit, the illegal possession of burglar's tools. Your deponent was subsequently taken to Mount Vernon Police Headquarters where he was fingerprinted, booked, and held for an ap-

pearance before the Court of Special Sessions of the City of Mount Vernon. Thereafter and on the 13th day of July, 1964, your deponent appeared before the Court of Special Sessions of the City of Mount Vernon, where he was arraigned on a charge of having violated Section 408 of the Penal Law.

Subsequently, and on or about the 28th day of July, 1964, your deponent again appeared before the Court of [fol. 7] Special Sessions of the City of Mount Vernon. At that time and place a preliminary hearing was held with respect to the charges made against your deponent and the matter was held for the further action of the Grand Jury of Westchester County.

Said Grand Jury thereafter returned the indictment against your deponent which is presently before this Court.

On the 2nd day of September, 1964, your deponent appeared before this Court for the purpose of pleading to the within indictment and at that time, while reserving his right to demur or otherwise move with respect to said indictment, your deponent pleaded not guilty to the charges made against him.

/s/ John Francis Peters
JOHN FRANCIS PETERS

Sworn to before me this
11th day of September,
1964.

/s/ Robert S. Friedman
Notary Public

ROBERT S. FRIEDMAN
Notary Public, State of New York
No. 60-6416200
Qualified in Westchester County
Commission expires March 30, 1966

[fol. 8]

AFFIDAVIT OF ROBERT S. FRIEDMAN IN SUPPORT OF MOTION TO SUPPRESS

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

ROBERT S. FRIEDMAN, being duly sworn, deposes and says:

FIRST: That your deponent is a member of the firm of FRIEDMAN, FRIEDMAN AND FRIEDMAN, Esqs., attorneys at law, and that said firm maintains offices for the practice of law at # 172 South Broadway in the City of White Plains, County of Westchester, State of New York.

SECOND: That your deponent is fully familiar with all the material facts herein.

THIRD: That heretofore and on or about the 10th day of July, 1964, the defendant, JOHN FRANCIS PETERS, was arrested by police officers attached to the Police Department of the City of Mount Vernon, County of Westchester, State of New York. The defendant was charged by said police officers with having violated Section 408 of the Penal Law of the State of New York. The gravamen of said charge being the illegal possession of burglar's tools.

Subsequently and on or about the 28th day of July, 1964, the defendant appeared before the Court of Special Sessions of the City of Mount Vernon, where a preliminary hearing was held with respect to the charges made against the defendant. At the conclusion of said hearing [fol. 9] the defendant was held for the further action of the Grand Jury of Westchester County. Thereafter the Grand Jury of Westchester County returned an indictment against the defendant, which indictment is presently before this Court.

Annexed hereto and made a part of the moving papers herein is a photostatic copy of the transcript of the preliminary hearing had before the HON. HARRY ZIM-

MERMAN, Acting City Judge of the Court of Special Sessions of the City of Mount Vernon.

Upon the preliminary hearing, the People presented two (2) witnesses in support of their case. The People's first witness was one SAMUEL L. LASKY, a police officer attached to the Police Department of the City of New York.

OFFICER LASKY testified, in substance, that he resided in a sixth (6th) floor apartment at # 465 East Lincoln Avenue, Mount Vernon, New York. His testimony revealed those premises to be a multiple dwelling, housing approximately one hundred twenty (120) families. (S.M. p. 3)

It was the testimony of OFFICER LASKY that on the 10th day of July, 1964, at or about 1:00 p.m. on that day, that he observed through the "peep hole" of his apartment door two (2) men tiptoeing towards the sixth (6th) floor stairway in his building. (S.M. p. 4) He further testified that he left his apartment, taking with him his revolver, and ran after the defendant, and that he apprehended the defendant between the fourth (4th) and fifth (5th) floors of the aforementioned premises, while the defendant was descending the stairway. (S.M. pp. 4 and 5)

While OFFICER LASKY pointed a revolver at the defendant, and while he had the defendant by the shirt collar, he asked the defendant why he was in the premises. The defendant told the police officer, in substance, [fol. 10] that he was in the premises in order to visit a girl friend. Upon being asked by the police officer for the name of the girl friend, the defendant refused to divulge the same, stating that the woman in question was a married woman. (see S.M. pp. 6, 7, and 13)

OFFICER LASKY testified on direct examination that he searched the defendant's person and removed therefrom an opaque plastic envelope, which he opened and which allegedly contained certain tools adaptable to the commission of burglaries. (S.M. pp. 7 and 8)

Cross-examination revealed that at the time of the occurrence the police officer was not in uniform, that he did not have his police badge, that he approached the defend-

ant with a drawn gun, that he failed to identify himself as a police officer and that, prior to the time he opened the envelope taken from the defendant's possession, he *had not* placed the defendant under arrest. (see S.M. pp. 11-15) OFFICER LASKY'S testimony further revealed that, after searching the defendant, he took the defendant to the first floor of the premises, and from the manager's office of said premises a telephone call was made to the Mount Vernon Police Department.

The second witness called by the People was one HYMAN GOODMAN, who testified that he was the Managing Agent of the subject premises and that the defendant, JOHN PETERS, was not a tenant of said premises. (S.M. p. 16)

At the conclusion of the People's case, the matter was held for he further action of the Grand Jury.

FOURTH: That your deponent makes this affidavit in support of the instant motion seeking the relief requested in the Notice of Motion herein. That your deponent desires to set forth the grounds which your deponent believes support and require the granting of the requested relief.

[fol. 11] Counsel respectfully submits to this learned Court that the evidence seized from the defendant's person, i.e., the envelope allegedly containing burglar's tools, should be suppressed as being the fruits of an illegal search and seizure.

The Fourth Amendment to the United States Constitution and Article I, Section 12 of the Constitution of the State of New York provide for the rights of the people to be secure against unreasonable searches and seizures. These constitutional provisions have been implemented by Sections 791-813 of the Code of Criminal Procedure. It is respectfully submitted to this learned Court that the law governing the reasonableness of a search and seizure requires that one or more of three conditions *must* be met in order for a search and/or seizure to be reasonable.

(a) A search is reasonable when it is conducted pursuant to a lawfully issued search warrant.

or

(b) A search is reasonable when it is conducted pursuant to consent,

or

(c) A search is reasonable when it is conducted as an incident to a lawful arrest.

People v. *Loria*, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462 (Court of Appeals, 1961).

Counsel respectfully submits that in the instant case it is patently obvious that none of the aforementioned conditions have been met. It is equally obvious that the actions taken by OFFICER LASKY and the defendant's subsequent arrest were without authority in law, and were in clear violation of the defendant's rights under the Constitutions of the United States of America and the State of New York and the implementing statutes hereinabove referred to.

[fol. 12] The transcript of the preliminary hearing clearly indicates that the defendant was not searched pursuant to a lawful warrant, and that the defendant did in no way give his consent to the search in question. Equally clear from said transcript is the fact that the defendant was searched prior to being arrested, and that his subsequent arrest resulted from the search. (see S.M. p. 15)

It is axiomatic that a search and seizure which is illegal at its inception cannot later become legalized by the results of that search and seizure, and that the legality of such a search and seizure must be determined by the facts as disclosed before the search was made. It is respectfully submitted that a search and seizure must be justified by the steps which precede it, which must be lawful in their entirety. Further, it has long been held that the fruits of an illegal search cannot be used against a defendant.

McDonald v. *United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L.Ed. 153 (1948);

Johnson v. *United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L.Ed. 436 (1948);

Nueslein v. *District of Columbia*, 73 App. D.C. 85, 115 F 2d 690 (1940).

The defendant was illegally searched, and evidence was illegally seized from his person, as a result of OFFICER LASKY'S illegal and unwarranted action. The transcript of the preliminary hearing makes it abundantly clear that OFFICER LASKY had no reason to believe that a crime had been committed, or was in the process of being committed, or that the defendant, in any manner, shape or form, had committed or was committing any illegal or wrongful act.

As was stated by the court in *Henry* v. *U.S.*, 361 U.S., 98, 104, 80 S. Ct. 168, 172, 4 L.Ed. 2d 134:

[fol. 13] ". . . an arrest is not justified by what the subsequent search discloses. *Under our system suspicion is not enough for an officer to lay hands on a citizen* . . ." (Emphasis supplied)

Counsel respectfully submits to this learned Court that the evidence in this case, seized from the person of the defendant, must be suppressed as the fruits of an illegal search and seizure.

With respect to that branch of the instant motion directed towards the sufficiency of the evidence presented to the Grand Jury, counsel respectfully submits that the only evidence which could have been submitted to the Grand Jury must have been evidence substantially similar in content to the testimony given on the preliminary examination held before JUDGE ZIMMERMAN. It is respectfully submitted, when the illegal evidence seized from the person of the defendant is subtracted from the totality of the evidence presented, there remains insufficient evidence to support the finding of the indictment herein.

In view of the foregoing, your deponent respectfully prays that an order be made and entered herein suppressing the evidence seized from the defendant's person, and permitting the defendant to inspect the Grand Jury minutes herein, or, in the alternative, if the Court should read said minutes, dismissing the within indictment upon the grounds that the within indictment is not founded upon sufficient legal evidence, together with such other, further

and different relief as to this Court may seem just and proper.

/s/ Robert S. Friedman
ROBERT S. FRIEDMAN

Sworn to before me this
11th day of September, 1964.

/s/ Martin S. Friedman
Notary Public

MARTIN S. FRIEDMAN
Notary Public, State of New York
No. 44-1326965
Qualified in Rockland County
Commission Expires March 30, 1965

[fol. 14]

Received, District Attorney, Sep. 15, 3:49 P.M., '64,
Westchester County

[fol. 15]

IN THE COURT OF SPECIAL SESSIONS
CITY OF MOUNT VERNON

THE PEOPLE OF THE STATE OF NEW YORK on the Information of Police Officer, THOMAS DROHAN, COMPLAINANT

-against-

JOHN PETERS, DEFENDANT

MINUTES OF HEARING—July 28, 1964

BEFORE:

HON. HARRY ZIMMERMAN
Acting City Judge

APPEARANCES:

ANTHONY J. CAPUTO, ESQ.
Assistant Corporation Counsel
City of Mount Vernon
For the Prosecution

RICHARD D. FRIEDMAN, ESQ.
Attorney for the Defendant
172 South Broadway
White Plains, N.Y.

[fol. 16] July 13, 1964—Defendant arraigned on the following Information:

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.
CITY OF MOUNT VERNON)

THOMAS DROHAN, a Police Officer in and for the City of Mount Vernon, comes and for Information, being duly sworn, on oath says: That at the City of Mount Vernon, in the said County, on the 10th day of July, 1964, one JOHN PETERS did wilfully and unlawfully have in his possession burglar's tools, to wit: picks, allen wrench-

es, adapted screwdriver, a pair of white woman's gloves, implements adapted or commonly used for the commission of burglary or larceny under circumstances evincing an intent to use and employ the same.

/s/ THOMAS DROHAN

Subscribed and sworn to before me
this 13th day of July, 1964.

/s/ SAMUEL J. RESNICK
Clerk of City Court, Mount Vernon, N.Y.

[fol. 17] MR. FRIEDMAN: With your Honor's permission, I respectfully request that the police witnesses be excluded from the Court.

THE COURT: Mr. Caputo, have you any objection to that?

MR. CAPUTO: It is not a trial and I don't know whether the same rights prevail.

THE COURT: All witnesses are excused. Please wait outside.

[fol. 18] On July 28, 1964 Hearing proceeds as follows:

SAMUEL L. LASKY, 465 E. Lincoln Avenue, Mount Vernon, N.Y. called as a Witness on behalf of the Prosecution having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CAPUTO:

Q Mr. Lasky, were do you reside?
A 465 E. Lincoln Avenue, Mount Vernon, N. Y.
Q On what floor do you live?
A On the top floor, apartment 603.
Q Will you describe the building to us, please?
A It is a 6-story brick building with 2 wings to it. There are 10 tenants on each floor and 6 floors on each wing. I live on the top floor.
Q At about one o'clock on that day, were you home in your apartment?

MR. FRIEDMAN: Was that one o'clock in the afternoon?

MR. CAPUTO: Yes, it was 1:00 P.M.

A Yes, I was home.

Q Did you have occasion to observe the defendant in this matter at or about that time?

A I did.

[fol. 19] Q Did you have occasion to observe the defendant in this matter at or about that time?

A I did.

Q Will you tell us what happened on that afternoon in the apartment house?

A I just stepped out of the shower and was in the process of drying myself when I heard a noise at the door. After I heard the noise at the door, my telephone rang and I went to answer it in the bedroom. After speaking to the person at the other end of the phone, I went to the door and looked out the peep hole and there I saw two men tiptoeing out of the alcove toward the stairway. I went to the telephone and called police headquarters and told the Sergeant at the desk that two burglars were on my floor.

MR. FRIEDMAN: I object.

THE COURT: Sustained.

MR. FRIEDMAN: I move to strike that out.

MR. CAPUTO: Please continue.

A I told the man who answered the phone that there was someone—

MR. FRIEDMAN: I object to any conversation.

THE COURT: Sustained.

MR. CAPUTO: Just tell us what happened.

[fol. 20] A I put some clothes on and went back to the door and saw a tall man tiptoeing away from the alcove and followed by this shorter man, Mr. Peters, toward the stairway.

Q Do you recognize the man as the defendant in this case?

A Yes, I do.

Q Please continue.

A I slammed the door, I had my gun and I ran down the stairs after them. I apprehended Mr. Peters between the fourth and fifth floors going down the stairway.

Q Before he started to run?

MR. FRIEDMAN: I object to that. The witness said *he* ran.

THE COURT: Overruled.

MR. FRIEDMAN: Exception.

Q At any time before you apprehended the defendant, did you have any conversation with him?

A No.

Q Did you say anything?

A No. When I went out my door, I ran down the hallway and went down the same stairway that I saw Mr. Peters and the fellow with him going down. I heard footsteps running down the stairway and between the 4th and 5th floors I collared him.

THE COURT: What is your business?

[fol. 21] MR. LASKY: I am a police officer.

THE COURT: Is the gun the one you use in the course of your duties as police officer?

MR. LASKY: Yes, and I carry it off duty. It is a registered revolver.

Q When you apprehended the defendant, did you have a conversation?

A I asked him what he was doing in the building. He said he was looking for a girl friend.

Q Where was the other person?

A The other person was still ahead down after I apprehended Mr. Peters. He was still going downstairs.

Q Did you make any attempt to apprehend him?

A Yes, I had Mr. Peters by the shirt collar and I began to run with Mr. Peters down the stairs.

Q Was Mr. Peters saying anything at this time?

A No.

Q How long have you lived in this apartment house?

A 12 years.

Q To your recollection, is Mr. Peters a tenant in the building?

A No.

Q What happened after that, after you brought him down stairs?

[fol. 22] A I brought him down to the 4th floor to see if a window was open to see if anybody was downstairs

that I could alert, and I frisked Mr. Peters and out of his right pants pocket I took a plastic envelope containing—

MR. FRIEDMAN: I object as to the contents of this.

THE COURT: Mr. Friedman, you are premature. He said he took a plastic envelope out of his pocket.

Q What did you take from his pocket?

A A plastic envelope.

Q What, if anything, was in the envelope?

MR. FRIEDMAN: I object.

THE COURT: Was this sealed when you took it from him?

A No.

Q Did you examine this?

A I didn't examine it thoroughly.

THE COURT: Do you know what was in there? Tell us what was in there.

MR. FRIEDMAN: I object. I am going to ask for a preliminary examination.

THE COURT: What were the contents when you first examined the envelope?

[fol. 23] A 6 Picks and 2 Allen wrenches with the short leg filed down to a screw driver edge, and a tension bar.

THE COURT: How long have you been on the New York City police force?

A Almost 18 years.

THE COURT: In the course of your 18 years on the police force, did you have cause to investigate burglaries?

A Yes sir, I did.

THE COURT: About how many? Can you estimate?

A Hundreds.

THE COURT: Based on your experience and investigation of burglaries, in your opinion were these items adaptable to committing burglaries?

A Yes.

Q I show you this envelope and ask you if this is the envelope and were these the items you took from the defendant at that time?

A Yes sir.

Q Were these the items that were in the envelope?

A Yes.

Q What did you do with this envelope?

A I put it in my pocket and later gave it to the [fol.24] detective who arrived at the scene, Detective Hodgins.

MR. CAPUTO: I offer it in evidence.

(Plastic envelope accepted and marked People's Exhibit "I" in Evidence).

MR. FRIEDMAN: May I have voir dire concerning admissability?

VOIR DIRE EXAMINATION BY MR. FRIEDMAN:

Q MR. Lasky, at the time you say you looked out of the peep hole of your apartment, were you able to see the faces of the men?

MR. CAPUTO: Objection.

THE COURT: Sustained.

Q Had you, when you took the defendant into custody, either apprehended him or placed him under arrest and charged him with the commission of any crime?

MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you have any warrant which authorized you to search the person of this man when you apprehended him?

MR. CAPUTO: I object.

THE COURT: Object sustained.

Q Had you seen this defendant do anything for which you placed him under arrest?

[fol. 25] MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you ask permission of the defendant before you searched him?

A No, I didn't.

Q The envelope in which these particular items were found is an opaque piece of plastic which you cannot see through. Is that correct?

A Yes.

Q When you removed this envelope from the defendant's pocket you were not able to see what the contents were, is that right?

A That's right.

MR. CAPUTO: I object.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

MR. CAPUTO RESUMES EXAMINING THE DEFENDANT:

Q I believe you went to the ground floor with the defendant.

A I was on the 4th floor. I went back to the 6th floor to see what had occured in the doorway that he had come out of.

Q Did you examine that door?

A Not too close. I saw a note in the doorway and [fol. 26] in my estimation they didn't get in.

Q You didn't read the note?

A I came back later for it. I took him down to the 6th floor, I mean to the 1st floor from the 6th floor by elevator and I informed the Management's Office to alert the Police Department by telephone for the other fellow who got away.

Q Did there come a time when the Mount Vernon Police arrived?

A Yes.

Q What took place at that time?

A I informed them what took place and turned the envelope over to the detective.

Q Had you ever seen the defendant before this day?

A No.

MR. CAPUTO: No further questions.

CROSS EXAMINATION BY MR. FRIEDMAN:

Q Mr. Lasky, when you looked out of the peep hole for the first time and you saw 2 men, were you able to see the faces of the men in the hallway?

A Yes, I gave a description to the man at the switchboard.

Q How long a period of time did you watch out of peep hole before you went back to the recesses of the apartment to answer the telephone?

[fol. 27] A I didn't answer the telephone. I made a telephone call.

Q How long?

A Only a matter of walking 50 or 60 feet and picking up the telephone.

Q Were you on the telephone for a few minutes, a few seconds, or how long?

A Just a few minutes.

Q When you came back to the peep hole, were you still able to see the 2 men?

A I saw them again tiptoeing out of the alcove, just like a reenactment of the first time.

Q Did they then go downstairs?

A I couldn't see.

Q Did you open the door of your apartment?

A Yes.

Q Did you run down the hallway?

A Yes.

Q Did you see anything?

A No.

Q Did you have your uniform on?

A No.

Q Did you have your police badge?

A No.

Q Did you have your gun out?

A I did.

[fol. 28] Q Was he walking down the stairway?

A He was walking in a rapid way.

Q Was the other man there that you had seen briefly with the defendant PETERS at that time?

A I didn't see the other man down the stairway.

Q You only saw the one person PETERS. Now, Officer Lasky are you able to state with certainty that one of the men on the 6th floor, when you looked out, was the person PETERS that you later saw on the 4 floor?

A Yes.

Q When you went up to Mr. Peters you say you "collared" him. What did you do physically?

A I grabbed him by the shirt collar.
Q Did you have your gun drawn at this time?
A My gun was in my hand.
Q Did you place Mr. Peters under arrest?
MR. CAPUTO: I object.
THE COURT: Sustained.
Q When you took him by the collar what did you say to him, if anything?
A I asked him what he was doing in the building.
Q And what did he say?
A He said he was looking for a girl.
Q You asked him for the name and he made no response?
A He made no response.
[fol. 29] Q Did the defendant tell you she was a married woman and didn't want to give the name?
A Yes.
Q Thereafter you searched Mr. Peters?
A I frisked him. I tapped his groin pockets and under his arms, and in frisking him I was looking for a weapon.
Q Did your frisking reveal a weapon?
A I felt something hard.
Q Did it have the shape of a gun?
MR. CAPUTO: I object.
THE COURT: Overruled.
THE COURT: You felt something hard in his pocket. Did it seem like a gun?
A No.

MR. FRIEDMAN RESUMES EXAMINATION:

Q Did it seem to be the envelope that was recovered?
A I didn't know what it contained.
Q Did it seem like some other weapon?
A It could have been.
Q Did it feel like a knife?
A It may have.
Q Did it feel like a knife?
A It could have been a knife.
Q Were you able to feel the length of this object before you took it out of the defendant's pocket?

[fol. 30] MR. CAPUTO: I object.

THE COURT: Overruled. Now, proceed Counsel.

Q Were you able to feel the length of this object, this hard object which you say was in the defendant's pocket?

A No.

Q Were you able to feel as to its width?

A No.

Q Did you remove this object from his pocket?

A I did.

Q Was it the first thing you removed from the defendant's person?

A Yes.

Q At that point, just prior to the time you removed the envelope from the defendant's pocket, did you say to him in so many words, you are under arrest?

A I don't recall.

Q Prior to the time you opened the envelope did you say to Mr. Peters that he was under arrest?

A No, I didn't.

Q Did you put this plastic envelope into your pocket?

A I did.

MR. FRIEDMAN: That's all I have of this Witness.

[fol. 31] HYMAN GOODMAN, 465 E. Lincoln Avenue, Mount Vernon, N.Y., called as a Witness on behalf of the prosecution, having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CAPUTO:

Q What is your occupation?

A I am the Managing Agent.

Q Are you the Managing Agent of 465 E. Lincoln Avenue, Mount Vernon?

A Yes.

Q Were you the Managing Agent on the 10th day of July, 1964?

A I was.

Q How long have you been the Managing Agent?

A Since March, 1960.

Q Are you familiar with the tenants in the building?

A Yes, I am.

Q I show you the defendant, JOHN PETERS, and

ask you if he is a tenant at 465 E. Lincoln Avenue, Mount Vernon?

A He is not.

Q Have you ever seen him before?

A No sir.

MR. CAPUTO: No further questions.

MR. FRIEDMAN: I have no questions your Honor, excuse me, may I?

[fol. 32] CROSS EXAMINATION BY MR. FRIEDMAN:

Q Mr. Witness, were you in your Managing Office when this defendant Mr. Peters was brought there?

A I was.

MR. CAPUTO: I object because it is out of the scope of my direct examination.

THE COURT: Sustained.

MR. FRIEDMAN: I except.

Q Were you present at the time the Mount Vernon City police officer came to your office?

A I was there prior to that time.

Q Were you present when the preceding Witness, Officer Lasky of the New York City Police Department, had Mr. Peters in your office?

A I was.

Q During what period of time?

THE COURT: There is no evidence that Mr. Lasky had the defendant in Mr. Goodman's office.

Q Was he there?

A He was.

Q Did you stay in the office until such time as the Mount Vernon City police arrived on the scene?

A I was there.

[fol. 33] Q Did the Mount Vernon City Police come into your office at the time the defendant PETERS was there?

A I could give you the story exactly as it happened in my own words.

THE COURT: Who was there first? Was the defendant PETERS there before the police came?

A No.

Q Did the police and the defendant come into your office?

A Yes.

Q When the police came into the office with Mr. Peters, were there one or more?

A I called the police on the phone and in a few seconds they came from all sides simultaneously and brought the defendant into my place.

Q Mr. Goodman, did you stay in your office while the police were there with the defendant?

A Just for a few seconds.

Q Do you know who Patrolman Lasky is?

A I do.

THE COURT: Please refer to Patrolman Lasky as *Mr. Lasky.*

Q Did you hear Mr. Lasky say to any Mount Vernon policemen when you were in the room, that he searched [fol. 34] the defendant and found him to be clean.

MR. CAPUTO: Objection.

THE COURT: Sustained.

MR. FRIEDMAN: Exception.

Q Did you stay in this particular office at any time—(I withdraw the question). I have no further questions.

THE COURT: You are excused.

MR. FRIEDMAN: At this time the defendant moves to dismiss on the grounds that the People have failed to prove a prima facie case and have failed to show these implements were recovered through the process of a lawful arrest under the Constitution.

THE COURT: Motion denied.

MR. FRIEDMAN: Respectfully accepted. The defendant respectfully waives further examination in this Court.

THE COURT: The Court holds the defendant for the action of the Westchester County Grand Jury.

THE COURT ADDRESSES MR. PETERS:

Q Mr. Peters, where do you live?

A 3042 23rd Street, Long Island City, New York.

Q Are you married?

A Yes.

[fol. 35] MR. FRIEDMAN: The defendant was previously admitted to bail by a justice of the County Court in the amount of $5000.00. I ask bail be continued. The bail was recommended by the office of the District Attorney. The defendant's bail is posted by the Peerless Insurance Casualty Company.

THE COURT: Bail continued.

CERTIFIED to be a true and correct transcript of the Minutes of Hearing held on July 28, 1964, in the COURT OF SPECIAL SESSIONS, CITY OF MOUNT VERNON, in the Matter of THE PEOPLE OF THE STATE OF NEW YORK, on the Information of Patrolman Thomas Drohan, Complainant, against JOHN PETERS, Defendant.

/s/ Rita R. Reynolds
Secretary

[fol. 36] IN THE COUNTY COURT
WESTCHESTER COUNTY

[Title Omitted]

7909/64

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

AFFIDAVIT OF JAMES J. DUGGAN IN OPPOSITION—
October 7, 1964

JAMES J. DUGGAN, being duly sworn, deposes and says that he is an Assistant District Attorney of the County of Westchester and makes this affidavit in opposition to a motion made on behalf of the defendant for a suppression of certain evidence seized from him and further for an order permitting an inspection by him or on his behalf of the Grand Jury minutes herein.

It is not your deponent's intention lightly to dismiss the obviously well prepared and exhaustively documented memorandum of law heretofore submitted on the defendant's behalf, but it is instantly apparent that it was written with total disregard for the criteria laid down by the Court of Appeals in *People* v. *Rivera*, 14 N. Y. 2d 441, for the authority of an officer to frisk a suspicious person. On September 2, 1964, the defendant was indicted by the Grand Jury of this county for the felonious possession of burglars' tools in violation of the Penal Law, sec. 408, and thereafter he pleaded not guilty to that crime in this Court.

Shortly following the defendant's arrest he appeared at a preliminary examination of this charge held in the City of Mount Vernon before Honorable Harry Zimmerman, Acting City Judge. The minutes of that examination are attached to the defendant's moving affidavit, and for the purposes of this argument we accept them as accurate. Briefly stated, a tenant at 465 East Lincoln Avenue, Mount Vernon, Samuel L. Lasky, who also is a

patrolman of the Police Department of the City of New York, observed the defendant and a companion tiptoeing about the sixth floor landing of this apartment building. He noted this conduct after hearing a sound at his own [fol. 37] door (SM 4). He called the Mount Vernon police and returned to the door after donning some clothes. The defendant was still tiptoeing around the hallway, so the officer opened the door, gun in hand, and apprehended the defendant who was then fleeing down the steps of the building (SM 5). The defendant was unable to offer the officer any satisfactory answer as to what he was doing in the building, and Lasky knew that the edefdant was not a tenant in the building (SM 6), so Lasky "frisked" him (SM 14). That frisk produced a small envelope which contained certain implements which in his judgment as a trained investigator of burglaries were burglars' tools (SM 8).

It seems to be the defendant's argument that because there was no search warrant, no consent on his part to be searched and no arrest, then the search was neither a search pursuant to a warrant, a consent or incidental to a lawful arrest. With each of these arguments, for the purpose of this argument only, we agree. We insist, however, that the frisk and the unlawful material which it produced were altogether authorized by the opinion of the Court of Appeals in *People* v. *Rivera*, supra. Although this particular incident occurred on July 10, 1964, some ten days after the effective date of the so-called stop and frisk law, we would prefer not to place our reliance on that section of the Code of Criminal Procedure, because the pronouncements of the Court of Appeals in the *Rivera* case, supra, are so clearly in point. The Court ruled that suspicious conduct, per se, while not, perhaps, being of such consequence as to validate an arrest, is certainly proper cause for interrogating a person as to his actions in a public place, and then went on to say that a necessary adjunct of this right is the privilege of insuring the officer's own safety while he exercises the right of thus interrogaating the suspicious person. There is no need to belabor the manifestly suspicious circumstances which prompted Lasky's behavior here. He heard a sound

at his door and, upon investigating it, observed two men pussyfooting through a hallway where they had no reasonable excuse for being. Perhaps more than anything else, the officer's conduct prior even to his leaving his apartment and encountering the defendant is significant. [fol. 38] Here we deal with a police officer of eighteen years' experience. His reaction is significant. Even before interrogating the defendant he had reported the defendant's presence there to the police (SM 4), and he had taken the precaution of arming himself (SM 5), even though only a few moments before he had been completely naked (SM 4), and the clothing he had put on presumably was minimal. Just as attorneys who perhaps would find it difficult to pass a Bar examination and physicians who might find requalifying for a medical license a problem can nevertheless manage to win law suits and cure people, so do policemen acquire over a period of years an acute sensitivity to crime and criminals. By this we do not mean to suggest to the Court that the validation for a search is to be found in the material it uncovers, but we do suggest that the the policeman's instinct in suspicious circumstances is best demonstrated, paradoxically enough, in the number of successful motions entertained by this and other courts for the suppression of condemning evidence.

It is respectfully submitted to the Court that while *People* v. *Rivera*, supra, remains the law in New York State and while our Court of Appeals is prepared to sustain the authority of a police officer to stop and interrogate a suspicious person in suspicious circumstances, and, if the officer deems it necessary for his own safety, to frisk that person, then this Court can do no less.

WHEREFORE, it is respectfully submitted that the motion to suppress the evidence disclosed by this search should be denied in each and every respect. If the Court should conclude that it be necessary to examine the Grand July minutes herein, they will be made available at the Court's request.

/s/ James J. Duggan

Sworn to before me this
7th day of October, 1964.

/s/ Alberta Lee McClure

ALBERTA LEE MCCLURE
Notary Public, State of New York
No. 60-2458300
Qualified in Westchester County
Term Expires March 30, 1965

[fol. 39] IN THE COUNTY COURT,
WESTCHESTER COUNTY

[Title Omitted]

7909/64
71/126

REPLY AFFIDAVIT OF ROBERT S. FRIEDMAN—
October 8, 1964

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

ROBERT S. FRIEDMAN, being duly sworn, deposes and says:

FIRST: That your deponent makes this affidavit in reply to the affidavit of JAMES J. DUGGAN, Esq., made in opposition to the instant motion.

SECOND: The People in opposing the granting of the instant motion rely solely upon the case of *People* v. *Rivera*, 14 N.Y. 2d 441, and although the People in their affidavit state that they do not rely on Section 180-a of the Code of Criminal Procedure, they inferentially refer to that statute.

With all due respect to the learned counsel for the People, your deponent submits to this Court that the *Rivera* case can in no way be made applicable to the facts in the instant case.

It must be noted that in *Rivera* the police officers were on motor patrol in an area of the City of New York which was experiencing a "crime wave", including crimes such as "muggings, stick-ups, assaults, larcenies, burglaries". The police officers in question at *1:30 a.m. in the dead of night* had the defendant Rivera, together with a companion, under observation for some *five (5) minutes*. They observed the defendant and his companion approach a certain bar and grill in a furtive manner, look inside the [fol. 40] window and then walk away. This action on the part of the defendant and his companion was repeated

several times until the defendant and his companion observed the police officers, whereupon they started to rapidly walk away from the scene. Thereafter the police officers accosted the defendant and his companion. Upon frisking the defendant Rivera on the outside of his clothing, one of the police officers felt a hard object which he thought to be a gun inside of the defendant's rear pocket. The police officer then removed from the defendant Rivera's person a loaded revolver.

In the instant case the search of the defendant took place at 1:00 o'clock in the afternoon in the hallway of a quiet residential apartment which is *not* located in an area noted for its "muggings, stick-ups, assaults, larcenies, burglaries, etc." Moreover, the totality of OFFICER LASKY'S observations was to the effect that he saw two (2) men tiptoeing in the hallway of his apartment building. These observations, unlike the observations in the Rivera case, were insufficient to justify even the wildest suspicion or surmise in the officer's mind that the defendant was about to commit or might possibly be about to commit some illegal act or action. Walking through a hallway in the middle of the afternoon, irrespective of the manner of your gait, can scarcely be considered a suspicious act.

The police officer's "frisk" in the instant case, unlike the *Rivera* case, did not indicate to the police officer that the defendant was possessed of a weapon. This is clearly demonstrated by the cross-examination of the police officer had on the preliminary hearing. On pages 14-15 of the Stenographer's Transcript the following questions and answers were had:

"Q Did your frisking reveal a weapon?
A I felt something hard.
Q Did it have the shape of a gun?
MR. CAPUTO: I object.
THE COURT: Overruled.
[fol. 41] THE COURT: You felt something hard in his pocket. Did it seem like a gun?
A. *No.*

MR. FRIEDMAN RESUMES EXAMINATION:

Q Did it seem to be the envelope that was recovered?

A I didn't know what it contained.

Q Did it seem like some other weapon?

A It could have been.

Q Did it feel like a knife?

A It may have.

Q Did it feel like a knife?

A It could have been a knife.

Q Were you able to feel the length of this object before you took it out of the defendant's pocket?

MR. CAPUTO: I object.

THE COURT: Overruled. Now, proceed Counsel.

Q *Were you able to feel the length of this object, this hard object which you say was in the defendant's pocket?*

A *No.*

Q *Were you able to feel as to its width?*

A *No.*

Q Did you remove this object from his pocket?

A I did.

Q Was it the first thing you removed from the defendant's person?

[fol. 42] A Yes.

Q At that point, just prior to the time you removed the envelope from the defendant's pocket, did you say to him in so many words, you are under arrest?

A I don't recall.

Q Prior to the time you opened the envelope did you say to Mr. Peters that he was under arrest?

A No, I didn't.

Q Did you put this plastic envelope into your pocket?

A I did."

(Emphasis supplied)

It is clear from the police officer's own testimony that he knew that the defendant was not armed at the time he completed the "external frisk". Yet despite this fact, he continued his exploratory search.

The product of the police officer's search was an opaque envelope which he removed from the defendant PETERS' person. Page 10 of the Stenographer's Minutes of the preliminary hearing makes quite clear the fact that the police officer had no knowledge of what was in the opaque envelope removed from the defendant's person prior to the time that he opened it, for he said:

> "Q Did you ask permission of the defendant before you searched him?
>
> A No, I didn't.
>
> Q The envelope in which these particular items were found is an opaque piece of plastic which you cannot see through. Is that correct?
>
> A Yes.
>
> Q When you removed this envelope from the defendant's pocket you were not able to see what the contents were, is that right?
>
> A That's right."

[fol. 43] Even if one would concede, which counsel does not, that the officer's action in "frisking" the defendant was proper, any further proceedings on his part coming as they did in the absence of a finding of a weapon and in the absence of permission to conduct a search, in the absence of a warrant of arrest or a lawful arrest, can only constitute a most flagrant violation of the Fourth Amendment to the United States Constitution and the defendant's rights thereunder.

That the search in the instant case far exceeded the permissible bounds delineated by the Court in *Rivera* is clearly set forth by the Court of Appeals in describing that search. JUDGE BERGAN, speaking for the Court, stated at page 463 that:

> ". . . The frisk as it is described in the actual events that occurred in this case, however, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried.
>
> It is something of an invasion of privacy; but so is the stopping of the person on the street in the first

> place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.
>
> That kind of search would usually require sufficient evidence of a committed crime to justify an arrest or be an incident to a lawful arrest (*Harris* v. *United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947)."

Certainly there were no facts in the instant case to justify a "full-blown search" of the defendant's person. Surely, the finding of an opaque envelope could not give the officer authority to inspect its contents. Nor can the finding of that envelope reasonably give rise to an inference that the police officer was concerned for his personal safety, so that the search and seizure in the instant case clearly cannot be predicated upon the reasoning of *Rivera* or Section 180-a of the Code of Criminal Procedure.

[fol. 44] With reference to Section 180-a of the Code of Criminal Procedure, counsel, without delving into the question of the constitutionality of that statute, desires to point out to this Court that, even if we assumed arguendo that said statute were constitutional, a reading of the statute clearly indicates that on its face it is not applicable to the facts in the instant case and that OFFICER LASKY'S search certainly exceeded the permissible bounds of that statute. In all events, it is called to the Court's attention that the People have stated that they do not rely upon the authority of that statute.

In view of the foregoing, counsel respectfully submits that the "frisk" in the instant case far exceeded the permissible bounds as expounded by the Court of Appeals in *Rivera* and as permitted by Section 180-a of the Code of Criminal Procedure. Accordingly, and in view of the People's concession, contained on page 2 of the affidavit in opposition, that the search of the defendant was not made pursuant to a warrant or pursuant to defendant's consent or pursuant to a lawful arrest, the only conclusion that can be had is that the search and seizure in the

instant case was illegal and was violative of the defendant's constitutional rights insuring him and all other citizens protection against unreasonable searches and seizures.

WHEREFORE, your deponent respectfully prays that an order be made and entered herein granting the defendant the relief as prayed for in the Notice of Motion herein.

/s/ Robert S. Friedman
ROBERT S. FRIEDMAN

Sworn to before me this
8th day of October, 1964.

/s/ Martin S. Friedman
Notary Public

MARTIN S. FRIEDMAN
Notary Public, State of New York
No. 44-1326965
Qualified in Rockland County
Commission Expires March 30, 1965

[fol. 45] IN THE COUNTY COURT,
WESTCHESTER COUNTY

HON. JOHN H. GALLOWAY, JR., County Judge

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

7909/64
71/126

OPINION—October 30, 1964

Defendant moves to suppress certain evidence (what appears to have been a set of burglar's tools), and also to inspect the Grand Jury Minutes or for dismissal of the indictment for insufficiency of legal evidence in support thereof, if the court reads the minutes. As a result of the events hereinafter related defendant was indicted for felonious possession of burglar's tools in violation of Section 408 of the Penal Law.

The facts before us, as disclosed on the preliminary hearing in the Mount Vernon Court of Special Sessions, are these: On July 10, 1964 at about one o'clock in the afternoon, Samuel Lasky, an off-duty police officer of New York City, of eighteen years' experience, was at home in his apartment in Mount Vernon, when he heard a noise at his door, on the sixth floor of a multiple dwelling, housing 120 tenants served by elevators. He saw through the peep-hole of his door two men, one of them the defendant, Peters, tiptoeing out of an alcove on the sixth floor toward the stairway. He called police headquarters and reported the incident. He returned to his peep-hole and saw the two men still tip-toeing from the alcove toward the stairway. With his service gun in hand he slammed his door after him, ran down the hallway and then down the stairs down which Peters and the other man were running, and "collared" Peters between the fifth and fourth floors.

[fol. 46] Lasky, who had never before seen the defendant as a tenant or otherwise in the apartment building, asked Peters what he was doing in the building. He said he was looking for a girl friend; and, when asked for her name, he said she was a married woman and declined to state her name. Lasky then frisked Peters, looking for a weapon, he said. He "felt something hard" in Peters' right pants pocket, which he said did not seem like a gun, but which "could have been a knife". He took out of Peters' pocket an opaque plastic envelope, the contents of which he examined, and found to consist of "6 picks and 2 Allen wrenches with the short leg filed down to a screwdriver edge, and a tension bar". Lasky said that, on his experience as a police officer in the investigation of burglaries, the items in the envelope were adaptable to the commission of burglaries.

During all of this Lasky was not in uniform, did not have his barge on, did not tell Peters he was a police officer or that he, Peters, was under arrest—prior to opening the plastic envelope, which he ultimately turned over to the Mount Vernon police, who had meanwhile arrived and taken the defendant into custody.

Defendant, who says he was visiting the premises to visit a friend, a lady friend, claims that after Lasky had collared him and pointed a revolver at him, and asked him what he was doing in the building, he started searching his person, and removed the plastic envelope from his possession. Peters urges that this constituted an unreasonable search and seizure and that the items so seized should be suppressed and excluded from evidence as being the fruits of an illegal search and seizure, since officer Lasky had no reason or probable cause to believe that a [fol. 47] crime had been committed, or was being committed, or that Peters had committed or was committing an illegal act.

The District Attorney resists the motions on the ground that the frisk and the burglar's tools which it produced were authorized by the recent decision of the Court of Appeals in *People* v. *Rivera*, 14 N.Y. 2d 441. The District Attorney prefers not to rely for authorization of Lasky's action on the recently enacted "Stop and Frisk"

statute (*Section 180-a, Code of Criminal Procedure*, added by L.1964, ch. 86, effective July 1, 1964), which provides:

> "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
>
> 2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person."

The motion to suppress thus raises these questions: 1. As to the right of a police officer to stop a person in a public place and question him for an explanation of his actions, under circumstances that would reasonably actuate investigation and inquiry; 2. as to the right of such officer to frisk the person being questioned as an incident to the inquiry; and 3. as to the admissibility of the evidence obtained by the "frisk".

A police officer on "off duty" status is nevertheless not relieved of his obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. How fortunate society is and has been that "off-duty" police officers have tradi- [fol. 48] tionally recognized this obligation, has been demonstrated on innumerable occasions in many communities when such officers have risked and sacrificed their lives to frustrate the commission of crime or to bring the perpetrator of crime to justice.

We are unable to accept the view which tends to deprecate, if not altogether to reject, as rank suspicion or an educated guess unworthy of acceptance, the experienced police officer's intuitive knowledge and appraisal of the

appearances of criminal conduct or action, accomplished or in the course of accomplishment, as one of the factors in reasonable cause for police action. In our opinion officer Lasky was properly acting as a police officer on the occasion here involved.

In determining the validity of the police action in this case, we believe the prescribed standards of initial action and the grounds and scope of the invasion of the person questioned to be applied are those contained in *Section 180-a* of the Code, since the action here involved was subsequent to the effective date of the "stop and frisk" statute.

In our opinion a person moving in the public halls and stairways of a fairly large apartment house is a "person abroad in a public place" within the statute's ambit. We also believe that the conduct of Peters and his companion, as observed by Lasky, under the circumstances described, furnished adequate grounds for Lasky to reasonably suspect that Peters was committing or had committed or was about to commit a felony or a crime specified in Section 552 of the Code. We think the testimony at the hearing does not require further laboring of this aspect of the matter, unless one is to believe that it is legitimately normal for a man to tip-toe about in the public hall of an apartment house while on a visit to his unidentified girl-friend, and, when observed by another tenant, to [fol. 49] rapidly descend by stairway in the presence of elevators. This is unacceptable to reason.

Having the required reasonable suspicion of Peters, officer Lasky was entitled under the statute to stop him and demand an explanation of his actions. Lasky's action in "collaring" Peters to stop him as he moved rapidly down the stairs was allowable under the circumstances. And, of course, he was entitled to demand, as he did, that Peters explain his actions. We believe that Peters' explanation was clearly unsatisfactory, and that under the circumstances Lasky's action in frisking Peters for a dangerous weapon was reasonable, even though Lasky was himself armed.

During the course of the external frisking of Peters' clothing the officer felt in his trouser pocket a hard object

which, we believe, he reasonably suspected might be a weapon, such as a knife, even though admittedly it did not feel like a gun. He had not yet arrested Peters when he withdrew the packet containing the alleged burglar's tools which we believe he properly opened in his search for a dangerous weapon. In view of the character of the implements in the envelope or packet, Lasky properly retained these items, the possession of which may have constituted a crime, and thereafter properly turned Peters over for arrest by the Mount Vernon police there present.

We conclude that officer Lasky was authorized under Section 180-a of the Code to stop and question Peters and to frisk him, under the circumstances here shown, and to retain the product of the frisk; that the standards of his initial action and the grounds and scope of his subsequent action met the requirements of the statute; that the product of the frisk was therefore legally obtained; and that consequently that product constituting evidence of felonious possession of burglar's tools is not subject to [fol. 50] suppression and exclusion. We further conclude that the police action here involved was within the standards enunciated by Judge Bergan in *People* v. *Rivera*, 14 N.Y. 2d 441, supra, and was authorized by the decision of the Court of Appeals in that case. The motion to suppress must be denied.

We now consider defendant's motion for leave to inspect the Grand Jury minutes as a basis for dismissal of the indictment for insufficiency of legal evidence to sustain it. His argument is, of course, grounded wholly on the exclusion of the packet of alleged burglar's tools, which would result in such insufficiency. In view of our denial of the requested suppression, the motion to inspect is denied.

Submit order on notice in accordance herewith.

Dated: WHITE PLAINS, NEW YORK
October 30, 1964

/s/ John H. Galloway, Jr.
JOHN H. GALLOWAY, JR.
County Judge of
Westchester County

HON. LEONARD RUBENFELD
District Attorney
County of Westchester

JAMES J. DUGGAN, ESQ.
Ass't. District Attorney
County of Westchester

ROBERT S. FRIEDMAN, ESQ.
Attorney for Defendant
172 South Broadway
White Plains, New York

[fol. 50 A]

[File Endorsement Omitted]

[fol. 51] IN THE COUNTY COURT,
WESTCHESTER COUNTY

* * * *

PRESENT:

HONORABLE JOHN H. GALLOWAY, JR.
County Judge

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

-against-

JOHN FRANCIS PETERS, DEFENDANT

7909/64
71/126

ORDER DENYING MOTION TO SUPPRESS—
December 18, 1964

The defendant having moved the Court for an order suppressing certain evidence, and for an order permitting the defendant to inspect the Grand Jury Minutes or in the alternative for an order dismissing the indictment herein for insufficiency of legal evidence,

Now upon reading and filing the Notice of Motion herein, with proof of due service thereof, the affidavits of ROBERT S. FRIEDMAN, Esq., and JOHN FRANCIS PETERS, in support of said motion, and the affidavit of JAMES J. DUGGAN, Esq., in opposition thereto, and the motion having been fully submitted to the Court, it is hereby,

ORDERED, that the said motion be and the same is hereby in all respects denied.

ENTER:

/s/ John H. Galloway, Jr.
J.C.C.

[fol. 51 A]

[File Endorsement Omitted]

[fol. 52] IN THE COUNTY COURT,
WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN FRANCIS PETERS, DEFENDANT

Index # 7909/1964
71/126

CERTIFICATE OF REASONABLE DOUBT—January 13, 1965

I, ROBERT J. TRAINOR, a Judge of the County Court of the County of Westchester, State of New York, who presided at the entry of the judgment of conviction of JOHN FRANCIS PETERS, the above-named defendant, on an indictment charging the said JOHN FRANCIS PETERS with the crime of violating Section 408 of the Penal Law of the State of New York, and who was convicted of said crime by the entry of his plea of guilty on the 17th day of November, 1964, do hereby certify that, in my oninion, there is reasonable doubt whether said judgment should stand.

My reasons for such opinion, and the questions which I deem of sufficient importance for review by the Appellate Court, are as follows:

(1) A substantial question of law exists as to whether or not the defendant's motion for the suppression of evidence was properly denied.

(2) A substantial question of law exists as to whether or not, in determining defendant's motion to suppress evidence, the Court erred in relying upon Section 180-a of the Code of Criminal Procedure, in that

(a) A question exists as to whether or not the defendant was a person "abroad in a public place" within the purview of said statute.

(b) A substantial question exists as to whether or not the police officer had reason to suspect that the defendant was committing or had committed or was about to commit a felony or any of the crimes specified in Section 552 of the Code of Criminal Procedure.

[fol. 53]

(c) A substantial question exists as to whether or not there were facts which would permit the police officer to reasonably suspect that he was in danger of life or limb.

(d) A substantial question exists as to whether or not the police officer's search exceeded the bounds of a search for a dangerous weapon, and exceeded the bounds permitted by Section 180-a of the Code of Criminal Procedure.

(e) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure is, on its face, contrary to and in violation of the express provisions of the Constitution of the United States of America.

(f) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure abrogates the right of the people to be secure in their persons against unreasonable searches and seizures, as provided for by the Fourth Amendment to the Constitution of the United States of America.

(g) A substantial question exists as to whether or not Section 180-a of the Code of Criminal Procedure violates the Fourteenth Amendment of the Constitution of the United States of America, in that it permits police officers on the basis of vague, arbitrary, capricious and unreasonable standards to conduct unreasonable searches of the persons of citizens of the United States of America, all without the due process of law.

DATED: White Plains, New York
January 13th, 1965

/s/ Robert J. Trainor
Judge of the County Court of
the County of Westchester

[fol. 53 A]

[File Endorsement Omitted]

[fol. 54] In the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn.

PRESENT—

HON. ARTHUR D. BRENNAN, Acting Presiding Justice.
" L. BARRON HILL, Justices.
" SAMUEL RABIN,
" JAMES D. HOPKINS,
" A. DAVID BENJAMIN,

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

JOHN FRANCIS PETERS, APPELLANT

ORDER ON APPEALS FROM JUDGMENT ETC.—
December 5, 1965

The above named John Francis Peters, defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the County Court, Westchester County, rendered January 4, 1965 on a plea of guilty, convicting him of the unlawful possession of burglar's instruments as a misdemeanor (Penal Law, Section 408) and imposing sentence, and the defendant having also appealed "from each and every intermediate order therein made," and the said appeals having been argued by Mr. Robert S. Friedman, of Counsel for appellant and by Mr. James J. Duggan, Assistant District Attorney, of Counsel for respondent; and the appeal from the intermediate order having been reviewed upon the appeal from the judgment of conviction, as no separate appeal lies from said order, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered and Adjudged that the judgment of conviction so appealed from be and the same hereby is unanimously affirmed.

Enter:

/s/ JOHN J. CALLAHAN
Clerk

[fol. 55]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 56]

[Triple Certificate to foregoing paper omitted in printing.]

[fol. 57] IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

JOHN FRANCIS PETERS, APPELLANT

OPINION—Decided July 7, 1966

* * * *

KEATING, J. Samuel Lasky was for 18 years a patrolman in the New York City Police Department and for 12 years resided on the sixth and top floor of a Mount Vernon apartment house. At about one o'clock on the afternoon of July 10, 1964, Lasky stepped out of the shower and heard a noise at his front door. Before he could investigate, his phone rang and he answered it. After he completed the call, he went to the door and through the peephole he observed two men tiptoeing about the hallway. He went back to the telephone, called the Mount Vernon police, dressed (not in uniform) and re-

turned to the door where he observed the two men tiptoeing toward the stairway. Armed with his gun, he slammed his door and followed the footsteps he heard running down the stairway.

Officer Lasky apprehended defendant—whom he did not recognize as being a tenant—between the fifth and fourth floors and asked him what he was doing in the building. Defendant claimed to be looking for a girl friend but refused to identify her because he said she was a married woman. Unimpressed with defendant's apparent chivalry, Lasky brought him to the fourth floor and frisked him for a weapon by tapping his groin pockets and under his arms. He felt something hard which "could have been a knife" and from the right pants pocket he withdrew an unsealed opaque plastic envelope. Upon examination the envelope was found to contain six picks, two Allen wrenches with [fol. 58] the short leg of each filed down to a screwdriver edge and a tension bar. These, from his 18 years' experience, Lasky instantly recognized as burglar's tools. Lasky then went back to the sixth floor doorway from which defendant had come but was satisfied that the two men had not gotten in. He took defendant down to the manager's office and turned him and the envelope over to Mount Vernon police.

Defendant's motions to suppress the evidence and to dismiss his indictment for unlawful possession of burglar's tools were denied. He was then convicted upon his plea of guilty.

On this appeal defendant contends that the evidence of the tools was the result of an unlawful search and seizure and was inadmissible. Specifically, he argues that (1) the rationale of *People* v. *Rivera* (14 N Y 2d 441) is inapplicable and (2) section 180-a of the Code of Criminal Procedure, if applicable, is unconstitutional.

Though *Rivera (supra)* was decided after the passage of section 180-a, the statute was not in effect at the time the events took place. We hold that the rationale of *Rivera* is applicable to the instant case so that even without the aid of the statute, the seizure of the burglar's tools was legal.

In *Rivera* we divided the problem into two stages: the legality of the detention and the legality of the frisk.

With regard to the former, we noted (p. 444) that it is the business of police to *prevent* crime and that prompt inquiry into "suspicious or unusual street action" is an indispensable police power "And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed" (p. 445).

The suspicious circumstances in this case warranted Officer Lasky's stopping defendant and inquiring as to his presence in the building. Though *Rivera* happened "in the streets", the power of inquiry is not limited to the streets. It is the reasonableness of the officer's suspicion which is determinative and the place where the events transpire is only one factor in weighing this suspicion.

In the instant case Lasky twice observed two men, whom, as a 12-year resident, he did not recognize as belonging in the building, tiptoeing around the top floor of an apartment house. When his door slammed, they hastily exited by the stairway, not the elevator.

Such circumstances are reasonably suspicious and the common law has long recognized the right of law officers in such a situation to make the limited intrusion of asking one for an explanation of his actions (see citations in [fol. 59] *Rivera, supra,* p. 446). In detaining defendant, Lasky was performing his duty and exercising a reasonable and necessary police power for the prevention of crime and the preservation of the public order. As the trial court noted, an off-duty policeman is not relieved of his obligation to preserve the peace or protect the lives and property of citizens. The acceptance of this duty has been demonstrated on numerous occasions when such officers have risked and sacrificed their lives to frustrate the commission of crime or to bring the perpetrator of crime to justice.

The second question in *Rivera* was whether the police could properly frisk defendant and seize something, the possession of which constituted a crime. Since the limited detention for the purposes of inquiry was found to be a

necessary adjunct to the prevention and discovery of crime, we further recognized that the answer to such an inquiry might be a bullet—in any event the exposure to danger could be very great. The frisk is a reasonable and constitutionally permissible precaution to minimize that danger. Since the frisk was held to be legal, the seizure of the evidence of a crime which was thereby discovered was also legal and the motion to suppress should have been denied.

It is well-recognized that the basis for a frisk is the concern for the well-being of the officer. Officer Lasky was in at least as dangerous a situation as was the officer who arrested Rivera, and probably more so. In *Rivera*, though it was nighttime, there were three policemen present and only two suspects and the frisking took place on a wide street. In this case a single officer collared a single defendant in the narrow confines of a stairway. Moreover, there was a second suspect still on the loose, perhaps still in the stairway. In such a situation the tables are easily turned, especially if the suspect possesses a dangerous weapon. Not only was Lasky's frisk legal, it was necessary—it would have been extremely poor police work *not* to have frisked the defendant in such a situation.

The fact that the frisk produced an envelope containing burglar's tools rather than a knife is not determinative. As we said in *Rivera*, "The fact that the police detective actually found a gun in defendant's possession is neither decisive nor material to the constitutional point in issue. The question is not what was ultimately found, but whether there was a right to find anything" (p. 447).

Lasky was in a potentially dangerous situation wherein a frisk was warranted. Touching an object which may have been a knife he was just as warranted in removing it as was the officer who removed Rivera's gun. Holding the unsealed envelope, Lasky was warranted in examining it for a knife just as he would be warranted in opening a holster to see if it had a gun. Once he saw the tools, [fol. 60] he had probable cause for arrest and was obviously entitled to seize them, as did the officer who seized Rivera's gun. Thus this case is wholly within the limits of *Rivera* and is a reasonable exercise of police power.

Turning next to section 180-a, it is apparent that there is not a great deal of difference between the statute and the standards used in *Rivera*. It is also apparent that the statute is applicable to the present facts. The hallways and stairways of large multiple dwellings, where delivery men, service men, visitors and other strangers are continually moving, must be considered public places within the statute. This is as it should be, considering the alarming number of elevator muggings, courtyard attacks and "second story" burglaries.

The statute makes it clear that the Legislature did not intend the stopping and frisking to be an arrest. Nor, as we pointed out in *Rivera*, does the intrinsic nature of the activity make it an arrest. Detention for a short and reasonable period in order to question is not an arrest, and such a right of inquiry was rooted in early English practice and approved by the common-law courts and commentators. (*United States* v. *Vita*, 294 F. 2d 524, 530.) As LUMBARD, C. J., noted in *Vita*, the line between detention and arrest is a thin one but a necessary one if there is to be any effective enforcement of the criminal law. For it not only aids the police but also protects those who are readily able to exculpate themselves from being arrested and having charges preferred against them before their explanations are considered.

Of course there must be an adequately defined standard for the authorization of the detention and the Legislature has provided one. The phrase "reasonable suspicion" provides a defined standard and is, in fact, no less endowed with an objective meaning than is the phrase "probable cause." Courts will have no difficulty in applying this standard and have frequently in the past referred to "suspicion" or "reasonable suspicion" as terms with a definite meaning, somewhat below probable cause on the scale of absolute knowledge of criminal activity.

Not only are we satisfied that "reasonable suspicion" is an adequate standard, we are also satisfied that the actions which it authorizes are constitutionally reasonable. For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes. The conflict between the

desire to be free from any police detention and the long-recognized need for police inquiry must be resolved by striking a fair balance. By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. His evaluation of the various factors involved insures a protective, as well as definitive, standard.

[fol. 61] In addition to the detention which is authorized, the officer is allowed to frisk the suspect if he reasonably suspects that he is in danger of life or limb. Again the standard is the reasonable suspicion of the officer. The frisk, as it was described in this case and as it is generally understood, involves the patting of the exterior of one's clothing in order to detect by touch the presence of a concealed weapon. In *Rivera*, we went to some length to distinguish a frisk from a full search: "It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person" (p. 446).

The frisk is necessary on grounds of elemental safety. Even when the police officer has the upper hand, the tables are easily turned. The policeman should not be forced to deal with the possibility of a suspect's going for a concealed weapon where he reasonably suspects the presence of such weapon. In this case Lasky was not trying to intimidate defendant nor was he merely trying to be a hero. He was acting, if not *beyond* the call of duty, at least on the fringe of duty. Before going after defendant he phoned the local police.

This officer is deserving of our highest praise. The Legislature has determined that such acts by police officers should not be discouraged by unnecessarily exposing them to the dangers of concealed weapons. Since a frisk is necessary to remove this danger and since it is less of an invasion than a full search, it is just that such a frisk

may be warranted upon grounds which would not sustain a full search—i.e., grounds less than probable cause.

If, as in this case, the frisk discloses something, other than a weapon, the possession of which is a crime, the statute requires the officer to return it or make an arrest. As long as the detention was proper and the frisk did not exceed its necessary and normal bounds, there is no reason to deny to the police the use of this evidence. If an arrest is to be made, the protective standard of reasonable cause must be met.

Thus, the effect of the statute is to set standards which will govern the police power of limited detention and the limited search known as a frisk. Where a person's activities are perfectly normal, he is fully protected from any detention or search. Where a person's activities, together with facts and circumstances of which a police officer has reasonably trustworthy information, are sufficient to warrant a reasonably cautious officer to suspect the person of committing or being about to commit certain crimes, that person may be detained and asked for [fol. 62] his name, address and an explanation of his activities. Where such a person has been detained and the facts and circumstances warrant the reasonable officer in suspecting that he is in danger of life or limb, the person may be searched for a dangerous weapon in the least obtrusive manner. Finally, where a person's activities and the facts and circumstances of which the police have reasonably trustworthy information are sufficient to warrant an officer of reasonable caution to believe that a crime is being or was committed, the police may arrest and fully search such a person.

Stripped to the barest essentials, "probable cause" requires satisfactory grounds for *believing* that a crime was committed, while "reasonable suspicion" requires satisfactory grounds for *suspecting* that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk. Such a difference in standards is both reasonable and desirable.

The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest

and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected. The varying standards now in effect through our decision in *Rivera* and through section 180-a best resolve this problem.

The Fourth Amendment protects not against *all* searches and seizures but "against *unreasonable* searches and seizures". The doctrine of "stop and frisk upon reasonable suspicion" does not produce unreasonable searches and seizures. It gives effect to the principle that the grounds for a stop should be reasonable in light of the degree of interference it represents.

In the recent case of *Ker* v. *California*, eight Justices agreed on that part of the opinion which stated: "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain" (374 U. S. 23, 34).*

By judicial action in *Rivera* and legislative action in section 180-a, our State has developed a reasonable and workable set of rules governing arrest, search and seizure. These rules are similar to those adopted in several other States, notably California whose criminal problems in [fol. 63] large urban areas are similar to ours. (See *People* v. *Martin*, 46 Cal. 2d 106; also *Kavanagh* v. *Stenhouse*, 93 R. I. 252, and *Commonwealth* v. *Lehan*, 347 Mass. 197.) Under these rules Officer Lasky properly executed his duties as a police officer and the motion to suppress was properly denied.

The judgment of the Appellate Division should be affirmed.

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* The ninth, Justice HARLAN, favored an even sharper demarcation between Federal searches and seizures and State searches and seizures, thus giving the States still greater leeway to determine the needs of their law enforcement agencies.

FULD, J. (dissenting). As I understand the Fourth Amendment, a search, not authorized by consent or a search warrant, is deemed reasonable only if conducted as incident to a lawful arrest which, at the very least, must be based upon "probable cause" for believing that the defendant has committed or is committing a crime. (See, e.g., *Rios* v. *United States*, 364 U. S. 253, 261-262; *Henry* v. *United States*, 361 U. S. 98, 100-102.) The requirement of probable cause may not be avoided by labeling the police tactic a "frisk" or calling it a "mere" search for dangerous weapons. Absent grounds for a lawful arrest—that is, probable cause—the possibility, or even "strong reason to suspect" (*Henry* v. *United States*, 361 U. S. 98, 101, *supra*), that an individual possesses contraband of any sort does not furnish a sufficient predicate for conducting a search. Nor does the fact that the law enforcement authorities may stop and question a suspicious-appearing person on less than probable cause justify a search. Its validity depends not upon the legality of the detention but rather upon the existence of probable cause. (Cf. *United States* v. *Rabinowitz*, 339 U. S. 56, 62-63; *Carroll* v. *United States*, 267 U. S. 132, 154.) In the case before us, there was admittedly no such probable cause and, consequently, the search and seizure were unlawful. Indeed, the unlawfulness of the search, the violation of constitutional right, is exacerbated by the fact that the evidence, which was taken from the defendant's person and became the sole basis for the prosecution, was not a gun or other weapon but burglar's tools.

Of course, there are risks inherenet in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, "Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets." (*People* v.

Rivera, 14 N Y 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)

The defendant Peters undoubtedly merits punishment for possessing burglar's tools and, it may be urged, deserves little consideration. But I cannot forget that the rights and privileges guaranteed by the Constitution are assured to every individual, to the worst and meanest of [fol. 64] men as well as to the best and most upright. The Fourth Amendment guarantees "The right of the people to be secure in their persons", and nothing said in *Ker* v. *California* (374 U. S. 23, 34) about developing "workable rules" to meet the practical demands of effective criminal investigation could, in my opinion, have been intended to approve or sanction a search solely on the basis of suspicion. In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People* v. *Sibron* (*infra*, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643). Perhaps, as some believe, this may be desirable but, until the Supreme Court authoritatively declares that "reasonable suspicion" justifies a search without a warrant and that the police may "frisk" a suspect without probable cause and—as Judge VAN VOORHIS pointedly notes in the *Sibron* case (*infra*, p. 606)—conduct "a general search of the person", I choose to adhere to the views I expressed in *Rivera* (14 N Y 2d 441, 448, cert. den. 379 U. S. 978, *supra*) and in *People* v. *Pugach* (15 N Y 2d 65, 70, cert. den. 380 U. S. 936).

In sum, then, I believe that section 180-a, authorizing a search upon less than probable cause, is unconstitutional and that the trial court erred in permitting the articles found in the defendant's pockets to be admitted in evidence and used against him. The judgment of conviction should be reversed.

FULD, J. (dissenting). As I understand the Fourth Amendment, a search, not authorized by consent or a search warrant, is deemed reasonable only if conducted as incident to a lawful arrest which, at the very least, must be based upon "probable cause" for believing that the defendant has committed or is committing a crime. (See, e.g., *Rios* v. *United States*, 364 U. S. 253, 261-262; *Henry* v. *United States*, 361 U. S. 98, 100-102.) The requirement of probable cause may not be avoided by labeling the police tactic a "frisk" or calling it a "mere" search for dangerous weapons. Absent grounds for a lawful arrest—that is, probable cause—the possibility, or even "strong reason to suspect" (*Henry* v. *United States*, 361 U. S. 98, 101, *supra*), that an individual possesses contraband of any sort does not furnish a sufficient predicate for conducting a search. Nor does the fact that the law enforcement authorities may stop and question a suspicious-appearing person on less than probable cause justify a search. Its validity depends not upon the legality of the detention but rather upon the existence of probable cause. (Cf. *United States* v. *Rabinowitz*, 339 U. S. 56, 62-63; *Carroll* v. *United States*, 267 U. S. 132, 154.) In the case before us, there was admittedly no such probable cause and, consequently, the search and seizure were unlawful. Indeed, the unlawfulness of the search, the violation of constitutional right, is exacerbated by the fact that the evidence, which was taken from the defendant's person and became the sole basis for the prosecution, was not a gun or other weapon but burglar's tools.

Of course, there are risks inherenet in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, "Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets." (*People* v.

Rivera, 14 N Y 2d 441, 452 [dissenting opinion], cert. den. 379 U. S. 978.)

The defendant Peters undoubtedly merits punishment for possessing burglar's tools and, it may be urged, deserves little consideration. But I cannot forget that the rights and privileges guaranteed by the Constitution are assured to every individual, to the worst and meanest of [fol. 64] men as well as to the best and most upright. The Fourth Amendment guarantees "The right of the people to be secure in their persons", and nothing said in *Ker* v. *California* (374 U. S. 23, 34) about developing "workable rules" to meet the practical demands of effective criminal investigation could, in my opinion, have been intended to approve or sanction a search solely on the basis of suspicion. In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People* v. *Sibron* (*infra*, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp* v. *Ohio* (367 U. S. 643). Perhaps, as some believe, this may be desirable but, until the Supreme Court authoritatively declares that "reasonable suspicion" justifies a search without a warrant and that the police may "frisk" a suspect without probable cause and—as Judge VAN VOORHIS pointedly notes in the *Sibron* case (*infra*, p. 606)—conduct "a general search of the person", I choose to adhere to the views I expressed in *Rivera* (14 N Y 2d 441, 448, cert. den. 379 U. S. 978, *supra*) and in *People* v. *Pugach* (15 N Y 2d 65, 70, cert. den. 380 U. S. 936).

In sum, then, I believe that section 180-a, authorizing a search upon less than probable cause, is unconstitutional and that the trial court erred in permitting the articles found in the defendant's pockets to be admitted in evidence and used against him. The judgment of conviction should be reversed.

Chief Judge DESMOND and Judges BURKE, SCILEPPI and BERGAN concur with Judge KEATING; Judge FULD dissents and votes to reverse in an opinion; Judge VAN VOORHIS dissents and votes to reverse for the reasons stated in his dissenting opinion in *People* v. *Sibron* (18 N Y 2d 603, 604), decided herewith.

Judgment affirmed.

[fol. 65]

No. 43

[File Endorsement Omitted]

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND, Chief Judge Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR—July 7, 1966

[fol. 66]

2. No. 43. 66

THE PEOPLE &C., RESPONDENT

vs.

JOHN FRANCIS PETERS, APPELLANT

Be it Remembered, That on the 31st. day of January in the year of our Lord one thousand nine hundred and sixty-six, John Francis Peters, the appellant—in this cause, came here unto the Court of Appeals, by Robert S. Friedman, his attorney—; and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in

said Court of Appeals by Leonard Rubenfeld, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 67] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert S. Friedman, of counsel for the appellant—, and by Mr. James J. Duggan, of counsel for the respondent—, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

[fol. 68] Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, July 7, 1966.

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 69] IN THE COUNTY COURT,
WESTCHESTER COUNTY

Index No. 7909/64
71/126

JOHN FRANCIS PETERS, APPELLANT

-against-

PEOPLE OF THE STATE OF NEW YORK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—September 7, 1966

I. Notice is hereby given that JOHN FRANCIS PETERS, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, entered on the 7th day of July, 1966, affirming the judgment of conviction rendered against the appellant on the 4th day of January, 1965, convicting the appellant of the crime and misdemeanor of unlawfully possessing burglar's instruments.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Appellant was convicted of the crime of unlawfully possessing burglar's instruments in violation of Section 408 of the Penal Law of the State of New York, and was sentenced to a term of one (1) year confinement in the Westchester County Penitentiary and is presently enlarged on bail in the sum of Fifteen Hunderd ($1500) Dollars.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 70]

1. Original Indictment.
2. Notice of Motion to Suppress, Etc.
3. Affidavit of John Francis Peters, Read in Support of Motion to Suppress, Etc.

4. Affidavit of Robert S. Friedman, Read in Support of Motion to Suppress, Etc.
5. Minutes of Hearing, Read in Support of Motion to Suppress, Etc.
6. Affidavit of James J. Duggan, Read in Opposition to Motion to Suppress, Etc.
7. Reply Affidavit of Robert S. Friedman, Read in Support of Motion to Suppress, Etc.
8. Opinion on Motion to Suppress, Etc.
9. Order Denying Motion to Suppress, Etc.
10. Order to Show Cause for Certificate of Reasonable Doubt.
11. Affidavit of Robert S. Friedman, Read in Support of Motion for a Certificate of Reasonable Doubt.
12. Certificate of Reasonable Doubt.
13. Opinions Rendered by the Court of Appeals of the State of New York on appeal to that Court.

III. The following questions are presented by this Appeal:

1) Is Section 180 (a) of the Code of Criminal Procedure of the State of New York, which provides for the stopping, questioning and searching of persons in public places, repugnant to and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

The Court of Appeals of the State of New York decided in favor of the validity of such statute.

Section 180 (a) of the Code of Criminal Procedure of the State of New York, reads as follows:

[fol. 71] 1. A Police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

2) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, because it permits the arrest of persons upon suspicion rather than and in the absence of probable cause, repugnant to, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

3) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, because it permits the search of persons upon suspicion rather than and in the absence of probable cause, repugnant to, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States?

4) Is said Section 180 (a) of the Code of Criminal Procedure of the State of New York, as applied to to the Appellant in permitting the stopping, questioning and searching of the Appellant, repugnant to, and in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States, and did the search of Appellant's [fol. 72] person constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States?

5) In view of the fact that the search of the Appellant and the seizure of evidence from his person was not authorized by a lawfully issued search warrant, or conducted pursuant to his consent, or as

an incident to a lawful arrest, was the search of Appellant's person and the seizure of evidence therefrom an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States?

/s/ Robert S. Friedman,
Attorney for John Francis Peters, Appellant

Office and Post Office Address
172 South Broadway, Suite 209
White Plains, New York. 10605

Dated: September 7th, 1966
White Plains, New York.

[fol. 73]

[Acknowledgment of Service (omitted in printing)]

[fol. 73 A]

Filed Oct. 4, 1966, Edward L. Warren, County Clerk

Service of a copy of the within is hereby admitted.

Dated, 9-7-66

/s/ Edward L. Warren
Clerk

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 846 Misc., October Term, 1966

JOHN FRANCIS PETERS, APPELLANT

v.

NEW YORK

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—March 27, 1967

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 846 Misc., October Term, 1966

JOHN FRANCIS PETERS, APPELLANT

v.

NEW YORK

APPEAL from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—March 27, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate Docket as No. 1192, case placed on the summary calendar, and set for oral argument immediately following No. 1139.

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